Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1354

CLUB RECREATION AND PLEASURE, an Oregon non-profit corporation; SWAN MANAGEMENT CO., an Oregon corporation; and JOHN R. TIDYMAN,

Petitioners,

v.

THE STATE OF OREGON, ex rel HARL HAAS, District Attorney for Multnomah County, State of Oregon,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

MARVIN S. NEPOM
J. BRADFORD SHILEY
610 SW Alder Street
Portland, OR 97205
Attorneys for
Petitioners

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v.

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

Petitioners pray that a writ of certiorari issue to review the judgment of the State of Oregon Court of Appeals entered in the above case December 4, 1979.

OPINIONS BELOW

The Circuit Court of the County of Multnomah, State of Oregon, issued findings of facts and conclusions of law which were not published. The opinion of the Court of Appeals of the State of Oregon is officially reported at 41 Or App 557, and unofficially at 599 P2d 1194 and is set forth in the appendix. The Supreme Court of the State of Oregon denial of review is officially reported at 288 Or 113.

JURISDICTION

The judgment of the Court of Appeals for the State of Oregon was made and entered on August 20, 1979, the Supreme Court of the State of Oregon denied review on November 20, 1979; and, the judgment and mandate affirming the decision below was entered on November 28, 1979 and amended on December 4, 1979. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

In a suit under ORS 465.110, the District Attorney for Multnomah County, Oregon, acting for the state, brought a civil suit to have a business offering nude dance and reading programs declared a nuisance. Defendants were enjoined from conducting, maintaining, using, occupying or permitting any premises in the county for prostitution; the personal property and fixtures of the building were sold; and, any use of the building was enjoined for one year. Running a house of prostitution is also punishable under the criminal law as a felony. The questions presented are:

1. Whether defendants' Fourteenth Amendment due process rights were violated in any or all of the following ways:

a. Whether defendants were denied the right to a jury trial;

b. Whether defendants were denied the right to have their guilt proved

by the standard, "beyond a reasonable doubt";

c. Whether the burden of proof was wrongly shifted to the defendants;

d. Whether defendants' property was taken without just compensation;

e. Whether the ambiguous and vague working of the statute deprived defendants of adequate notice.

2. Whether defendants and club members and employees were deprived of their First Amendment right of free association and their constitutional right of privacy.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment, United States Constitution.

2. The Fifth Amendment, United States Constitution.

3. The Fourteenth Amendment, United States Constitution.

4. Oregon Revised Statutes, §465.110 which provides:

"Places used for prostitution

or unlawful abortions declared a nuisance; abatement. Whoever establishes or maintains any place used for the purpose of lewdness, assignation or prostitution or any other immoral act, or a place where pregnancies are terminated in violation of ORS 435.415, 435.425 and 435.455 is guilty of maintaining a nuisance. The place where such lewdness, assignation or termination of pregnancies is conducted or carried on and the contents of such premises are declared a nuisance and shall be enjoined and abated as provided in ORS 465.120 to 465.180."

5. Oregon Revised Statutes, §465.120, which provides:

"Suit to enjoin nuisance. Whenever a nuisance exists under ORS 465.110, the district attorney shall or any taxpayer of the county may maintain a suit in equity in the name of the state to perpetually enjoin such nuisance, the persons conducting or maintaining the same, and the owner, lessee or agent of the building or ground upon which the nuisance exists."

6. Oregon Revised Statutes, §465.150, which provides:

"Order of abatement; closure; sale of contents; entering prohibited. (1) If the existence of the nuisance is established

in a suit under ORS 465.120, an order of abatement shall be entered as a part of the judgment in the case. This order shall direct:

(a) Removal from the building or place of all fixtures, furniture, instruments, appliances, medicines, drugs, contents or movable property used in conducting the nuisance.

(b) Sale of the property removed in the manner provided for the sale of chattels under execution.

(c) The effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released.

(2) No person shall break and enter or use a building, erection or place so directed to be closed.

(3) For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for execution. For closing the premises and keeping them closed a reasonable sum shall be allowed by the courts."

7. Oregon Revised Statutes, §465.155, which provides:

"Appearance by owner of closed property for relief from closure order. The owner of any real or personal property so closed or restrained, or to be closed or restrained, may appear at any time be-

between the filing of the complaint and the trial and show cause why the court should cancel or refrain from issuing any decree or orders as against him. Such owner, in order to obtain such relief, must prove to the satisfaction of the court that he is the lawful owner of said property and, further, that with reasonable care and diligence he could not have known of the illegal use of his property.

STATEMENT

The District Attorney for Multnomah County, Oregon, acting for the state, brought a civil suit to have a nuisance declared and to have injunctions issued. Defendants filed a demurrer raising the constitutional issues for which review is currently sought. The trial court overruled the demurrer.

The evidence at trial indicated that for membership and program fees, defendant Club Recreation and Pleasure, operating as the Pleasure Palace, offered nude dancing, reading, and saunas to its customer-members. On several occasions police vice officers visited the club, bought memberships, and contracted with club employees in private

to perform a sex act for money. Each time the employee was arrested for prostitution. Evidence of common fame of the premises as a house of prostitution was allowed. The club made it clear upon hiring of all its employees that prostitution was illegal and not allowed.

The trial court did not grant the defendants a jury trial, and did not apply the standard of proof required in a criminal case, even though the activities complained of were punishable as a felony, and historically the offense of maintaining a house of prostitution is a malum in se crime, involving moral turpitude. State ex rel Risco v. Biggs, 198 Or 413, 255 P2d 1055 (1953). No evidence regarding the knowledge of the lessee or owner of the premises was required, since ORS 465.155 provides that the owner of the property has the burden of proof to show that with reasonable care and diligence he could not have known of the illegal use of the

premises, in order to be relieved from the injunction and the loss of use of the property.

The trial court found that defendant Club Recreation and Pleasure had established, maintained, used and occupied the premises for lewdness, assignation, and prostitution, that defendant Swan Management Company was lessee of the premises, and defendant Tidyman owned the premises, and that the activities complained of, i.e. the prostitution activities of several ex-employees of the club, constituted a public nuisance. The defendants, land, and building were ordered "permanently enjoined and restrained from conducting, maintaining, using, occupying or permitting the use or occupancy of the premises or any premises in Multnomah County for prostitution". The building was ordered closed for any use for one year and the personal property and fixtures of the building were sold. The injunction was issued in spite of the fact that defendants

did not have adequate notice that ORS 465.110 might apply to them, since the terms "lewdness" and "assignation" are not susceptible of certain meaning and unconstitutionally vague and the term "prostitution" is not included in the second sentence of ORS 465.110 which specifies which acts, specifically lewdness, assignation, and the termination of pregnancies, may be enjoined.

The Oregon Court of Appeals affirmed the trial court. The court of Appeals concluded that Oregon Revised Statutes Chapter 465 was not a criminal statute because the statute did not impose a sentence of incarceration, a fine, or the entry of a criminal record; yet, the statute is confiscatory, imposing economic loss instead of a direct fine by closure of the buidling and business for a period of one year and the forced sale by governmental authorities of personal property. Defendants' freedom of association is also infringed by the injunction, and the defendants are subject to arrest, im-

prisonment and fine for an extremely broad, almost unlimited range of activities. There are broad and extensive criminal type sanctions imposed by the injunctions issued by Oregon Revised Statute Chapter 465 which attempts to regulate criminal activities, and for which there exists a felony statute for the same complained of activities.

The Court of Appeals decided the statute was not ambiguous and vague by rewriting ORS 465.110 to include the word "prostitution" in the second sentence, and by finding that the terms "assignation" and "lewdness" were not indefinite and vague because they could be located in Webster's Dictionary and Black's Law Dictionary, respectively.

The Court of Appeals decided the process did not unconstitutionally shift the burden of proof because plaintiff needs to prove the existence of the nuisance; in fact, the owner and lessee have the burden of showing they, with reasonable care and

diligence, could not have known of the illegal use of the property in order to be free from the loss of the premises for one year. The Court of Appeals did not discuss Western & Atlantic Railroad v. Henderson, 279 U.S. 639 (1929) and Speiser v. Randall, 357 U.S. 513 (1958).

The Court of Appeals held that the property was not taken without just compensation because the property owner could petition for the release of the property after the filing of a bond, and because the proceeds of the judicial sale of the personal property are paid to the owner after deduction for costs, even though this amounts to a substantial taking.

The Court of Appeals did not consider defendants' contentions that the abatement procedures of Oregon Revised Statutes Chapter 465 deprive members and employees of defendant club of their First Amendment rights of free expression and constitutional rights of privacy, and the land-

holder's freedom of expression and association restrained by the shifting of the burden of proof. See Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Lovisi v. Slayton, 363 F Supp 620, 626 (1973), applying Griswold v. Conn., 381 U.S. 479 (1965); and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

The Oregon Supreme Court denied review.

REASONS FOR GRANTING THE WRIT

1. The defendants' rights in this case have been denied by the state's labeling of an enforcement proceeding to prevent acts of prostitution as a civil rather than a criminal proceeding. As the result of this "civil" proceeding, defendants are required to affirmatively avoid "conducting, maintaining, using, or occupying or in any way permitting the use or occupancy of said premises or any other premises in Multnomah County for prostitution". Defendants also lose the economic enjoyment of this business and property for one year. Under this

statutory scheme, the District Attorney for the County is able to deprive defendants of rights and to effectively impose a fine upon the defendants equal to the value of the loss of their property. By proceeding with the civil suit, defendants are denied a right to a jury trial and a requirement of proof of criminal acts by the standard "beyond a reasonable doubt". The lessee and owner of the property are held responsible merely upon proof of their ownership of the property, the shifting of the burden of proof is unconstitutionally unfair. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens." Speiser v. Randall, 375 U.S. 513 526 (1958). The wording of the statute also does not give adequate notice that the prostitution activities may be enjoined; defendants were denied their rights to adequate notice nor could they adequately defend against the

charges because of the ambiguous and vague wording of the statute. In total, defendants' due process rights are manifestly ignored by the proceedings utilized in this case.

The denial of rights in this case makes a travesty of the rights afforded a person in court by the Fourteenth Amendment before a party's liberty and associational freedom will be infringed and property is taken. There is no justification for placing the burden of proof of a person to show that he has not participated in a criminal act and no reason the state should be able to circumvent procedural rights afforded defendants accused of the crime of operating or maintaining a house of prostitution simply by labelling the deprivative proceeding a civil suit.

The obvious purpose and design of the statute is to control criminal activity. The practical effect of the statute is to

permit law enforcement authorities who cannot prove that the owners and management of a business are directing prostitution activity or aiding and abetting in those activities, to effectively "punish" the owners and management by depriving them of the premises and personal property of their business and limits their liberty rights through a summary civil procedure which denies effective constitutional safeguards.

The statute denies the defendants the right to jury trial and permits their "conviction" for maintaining a place for "lewdness" and "assignation" where the "public interest and good morals require its (the place) prompt abatement ***" and does not require a clearly defined criminal act. In addition, the statutory scheme permits evidence such as "common fame" upon which closure can be based.

This last factor permitted the state to bring in two neighbors who testi-

fied that they have no idea what goes on in the premises and have never been there themselves; but, their neighbors have told them that it is a "whorehouse". With that evidence, this statutory scheme permits the state to close for the period of one year a building of an owner who the state has not proven has knowledge of the activities of the house and in fact the house or premises may not even be used for those activities which are prohibited.

This type of conduct on the part of the state is terrifying and flies in the face of nearly every constitutional safeguard of this system.

2. Enjoining and closing Club Recreation and Pleasure deprives members of the club their rights of free association and their rights to privacy. Even if some conduct related to the club was permissably subject to regulation, less restrictive means could be employed in this action than the overbroad and vague

statutes being challenged. Elfbrandt v. Russell, 384 U.S. 11 (1966). Club's employees' right to protected symbolic, non verbal speech is also protected by the First Amendment. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Defendant Club has standing to raise the rights of its employees and members; when statutes purport to regulate free expression, the court will permit alleged violators whose activity could have been regulated under a narrowly-drawn statute to raise the potential impact of the statute on third parties. Dombrowski v. Pfister, 380 U.S. 479 (1965); Note, "Standing to Assert Constitutional Jus Tertii", 88 Harvard Law Review 423 (1974-5). The state's summary proceedings infringe upon protected association and speech rights; there is no state interest in regulating all the activity of the Club, which operated on private property and in private property and in private; any interest the state might have in regulating some activity could be protected by a less restrictive means than the

summary procedures employed here.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARVIN S. NEPOM and
J. BRADFORD SHILEY
Attorneys for
Petitioners
610 SW Alder Street
Portland, OR 97205
(503) 223-1137

IN THE COURT OF APPEALS OF THE STATE OF OREGON

The State of Oregon ex rel Harl Haas, District Attorney for Multnomah County, State of Oregon,

Respondent,

v.

No. A 7802-02280
CA 11302

Club Recreation and Pleasure, an Oregon nonprofit corporation; Swan Management Co., an Oregon corporation; and John R. Tidyman,

Appellants.

AUG 16 1979

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Appeal from Circuit Court, Multnomah County.

Richard J. Burke, Judge.

Argued and submitted March 19, 1979.

Marvin S. Nepom, Portland, argued the cause and filed the briefs for appellants.

Frederick Lenzser, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief was Harl Haas, Multnomah County District Attorney, Portland.

Before Schwab, Chief Judge, and Tanzer, Richardson and Roberts, Judges.

ROBERTS, J.

Affirmed.

FILED AUGUST 20, 1979.

ROBERTS, J.

Defendants appeal from an order and decree of the trial court finding that they had maintained a nuisance by establishing, maintaining, using and occupying certain premises for lewdness, assignation and prostitution. Suit was brought by the state pursuant to ORS 465.110 through 465.180 which provide for the abatement of certain nuisances. Defendants raise many challenges to the statutory abatement scheme, several of which merit our discussion here, and challenge the sufficiency of the evidence as to one of the trial court's findings of fact. We affirm.

Defendant Club Recreation and Pleasure operated the subject business which was known as the "Pleasure Palace." Defendant Tidyman purchased the real property involved in this suit by a 1972 contract of sale. On September 7, 1977 he assigned his interest in the subject property to defendant Swan Management Company for $10. The assignment was not recorded.

For membership and program fees, the Pleasure Palace offered programs of nude dancing, reading and saunas to its customers. In September of 1977, after a Portland Police Bureau vice officer had seen a full page magazine advertisement for the Pleasure Palace depicting explicit sexual contact, an undercover police officer visited the establishment. After paying the membership and program fees, he contracted with an

individual employee for the performance of a sex act in exchange for money. This scenario was repeated by other police officers on several different dates; in each case the employe was arrested.

The state brought suit to have the premises declared a nuisance and the nuisance enjoined pursuant to ORS 465.110 and 465.120 which provide:

> "Whoever establishes or maintains any place used for the purpose of lewdness, assignation or prostitution or any other immoral act, or a place where pregnancies are terminated in violation of ORS 435.415, 435.425 and 435.455 is guilty of maintaining a nuisance. The place where such lewdness, assignation or termination of pregnancies is conducted or carried on and the contents of such premises are declared a nuisance and shall be enjoined and abated as provided in ORS 465.120 to 465.180." ORS 465.110.

> "Whenever a nuisance exists under ORS 465.110, the district attorney shall or any taxpayer of the county may maintain a suit in equity in the name of the state to perpetually enjoin such nuisance, the persons conducting or maintaining the same, and the owner, lessee or agent of the building or ground upon which the nuisance exists." ORS 465.120.

Defendants filed a demurrer raising, inter alia, a variety of constitutional challenges to the civil nuisance abatement statutes. The demurrer was overruled. After a trial to the court, the trial judge held that defendant Club Recreation and Pleasure had established, maintained, used and occupied the premises for lewdness, assignation and prostitution, that defendant Swan Management Company was lessee of the premises,

that defendant T'dyman owned the premises, and that the activities complained of constituted a public nuisance. The land and the buildings were ordered "permanently enjoined as a place in or on which to conduct" the nuisance complained of and each of the defendants was permanently enjoined and restrained from conducting, maintaining, using or occupying, or permitting the use or occupancy of the premises or any premises in Multnomah County for prostitution.[1] The building was ordered closed for any use for one year and the contents and movable property in the building were ordered removed and sold. ORS 465.150.[2]

I

Citing Brown v. Multnomah County Dist. Ct., 280 Or 95, 570 P2d 52 (1977), defendants first contend that although ORS 465.110 is a civil statute, its purpose and effect is to control criminal activities and impose criminal sanctions without providing constitutional safeguards afforded criminal defendants such as the rights to a jury trial and to have guilt proved beyond a reasonable doubt. Defendants point out that maintaining a place of prostitution is punishable as a crime, ORS 167.012,[3] and argue that by using the civil statute, the state is denying the defendants the rights they would have had if prosecuted under the criminal statute.

In Brown the Supreme Court was called upon to decide whether the legislature had successfully decriminalized the first

offense of driving under the influence of intoxicants by calling it a "traffic infraction" rather than a "traffic crime." The court in Brown noted that the offense involved arrest, detention, a possible fine of up to $1000 and entry of conviction upon the defendant's driving record, as well as collateral consequences such as suspension of the driver's license, imprisonment for non-payment of the fine and elevation of any subsequent DUII charge within five years to a traffic crime.

In the abatement proceeding before us there is no possibility of incarceration. The Brown court noted that this factor alone would not decide whether or not a proceeding was criminal or civil in nature, but stressed its importance among the factors to be examined.

The abatement scheme does not provide for a fine,[4] nor does it require anything to be entered on a criminal record. At most, a defendant will pay the costs for the sale and removal of personal property used in conducting the nuisance, ORS 465.150(c)(3) or, if he chooses and the judge is satisfied as to his good faith, he will secure a bond allowing him to keep the premises open during the year they would have been closed upon condition that the nuisance not be reinstated. ORS 465.180.[5]

The Court of Appeals of Tennessee in analyzing a similar statute concluded

> "The statute imposes no penalty upon the owner, nor does it act retrospectively, its whole purpose is prospective, having for its sole object and aim, the prevention, by injunction, of a continuation of the illegal use of the property. * * *" State Ex Rel. Webster v. Daugherty, 530 SW2d 81, 86 (WD Tenn App 1975).

The Court of Appeals of New York came to a like conclusion in examining its statute which, like ours, provides for closing the premises for all purposes for one year unless a bond is posted.

> "* * * The provision that the court shall direct the effectual closing of the building for a year is not a forfeiture nor a penalty. It is imposed not because the owner of the premises has committed an offense, but because under his ownership a nuisance has been created by a person suffered to occupy the premises. It constitutes an appropriate means of definitely and completely ending the nuisance. Its character is established by the provision that, if the owner, by filing a bond in the value of the property, gives assurance that 'he will immediately abate said nuisance and prevent the same from being established, or kept therein within a period of one year' (§ 343-v), the court may, when satisfied of the good faith of the owner, cancel the order of abatement." People ex rel Lemon v. Elmore, 256 NY 489, 177 NE 14, 16 (1931).

We similarly conclude that rather than circumventing the criminal statute, the civil abatement statute serves an entirely different purpose, i.e. that of providing prospective equitable relief from continuation of the nuisance. See Annot., 75 ALR 1298 (1931).

II

Defendants next contend that the abatement proceedings

authorized by ORS chapter 465 are confiscatory in nature and as such amount to a taking of defendants' property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. ORS 465.150 (see n 1) provides that if existence of a nuisance is established, an abatement order shall be entered as part of the judgment and shall direct that the premises be closed for all purposes for one year, unless sooner released, and that personal property used in maintaining the nuisance be sold.

The owner of the real or personal property can seek cancellation of the order upon a showing "that with reasonable care and diligence he could not have known of the illegal use." ORS 465.155. Even where the owner was aware of the illegal conduct, he can request that the property be released to him upon the payment of costs and the filing of a bond to secure that the nuisance not be reinstated. ORS 465.180. Where personal property is sold, the proceeds, less costs, are recoverable by the owner. ORS 465.170.

While the owner may be temporarily deprived of the use of the real property and will permanently lose the use of personal property used for conducting the nuisance, the state has a valid interest in prohibiting the illegal use of property and the above-listed safeguards prevent the deprivation from amounting to an unconstitutional taking. Accord, People ex rel

Difinis v. Futia, 65 Ill App 3d 1027, 383 NE2d 763 (1978); The People v. Smith, 275 Ill 256, 114 NE 31 (1916); Pompano Horse Club et al., v. State of Florida, 93 Fla 415, 111 So 801, 807, 52 ALR 51 (1927).

III

Defendants further contend that ORS 465.155 unconstitutionally shifts the burden of proof to the defendant. ORS 465.155 provides that the owner of any real or personal property closed or restrained by an abatement order pursuant to ORS 465.150 may

> "* * * appear at any time between the filing of the complaint and the trial and show cause why the court should cancel or refrain from issuing any decree or orders as against him. Such owner, in order to obtain such relief, must prove to the satisfaction of the court that he is the lawful owner of said property and, further, that with reasonable care and diligence he could not have known of the illegal use of his property." (Emphasis supplied.)

ORS 465.130[6] places the burden of proof on the plaintiff by requiring a showing in the complaint or by affidavit that a nuisance exists. There is no requirement that the plaintiff prove knowledge on the part of the owner in order to show that an abatable nuisance exists. ORS 465.155 makes available to the defendant an affirmative defense at any stage of the proceedings prior to trial by which he may show that he had no knowledge of the nuisance and in this way avoid those parts of the abatement order which would be personal to

him, i.e., the selling of personal property or the order that he may not use real property for any purpose for a year. Defendant has the burden of going forward with the evidence as to this affirmative defense; the burden of proof as to establishing the existence of the nuisance is not affected.[7]

IV

Defendants next contend that ORS 465.110 does not permit the application of the abatement scheme to places maintained for prostitution.

ORS 465.110 states in relevant part:

> "Whoever * * * maintains any place used for the purpose of lewdness, assignation or prostitution or any other immoral act, or a place where pregnancies are terminated * * * is guilty of maintaining a nuisance. The place where such lewdness, assignation or termination of pregnancies is conducted or carried on and the contents of such premises are declared a nuisance and shall be enjoined and abated as provided in ORS 465.120 to 465.180."

Defendants contend that the legislature specifically excluded the word "prostitution" from the second sentence of the statute and did not intend the abatement procedures to apply to prostitution.

In Lane County v. Heintz Const. Co. et al, 228 Or 152, 364 P2d 627 (1961), the Supreme Court stated:

> "The insertion of words inadvertently omitted or the alteration of the language of a statute by a court is a power always cautiously exercised and never employed unless it can be clearly seen that to do so is necessary to effectuate the legislative intent. * * *" 228 Or at 160.

In this case to construe the statute as urged by the defendants would lead to an absurd result. We do not believe it was the legislative intent to carefully name those activities which constitute nuisances and then provide a remedy for only some.

We, therefore, view the omission of the word "prostitution" from the second sentence as an oversight and hold that the abatement proceedings are intended to apply to places used for prostitution.

V

Defendant further contends that the words "lewdness" and "assignation" have no definite meaning and are void for vagueness under the due process clause of the Fourteenth Amendment to the United States Constitution. In construing the statute, we look to the natural and obvious meaning of the words. State ex rel Nilsen v. Hemstreet, 7 Or App 474, 478, 491 P2d 1185 (1971). Lewdness is defined as "gross indecency so notorious as to tend to corrupt the community's morals." Black's Law Dictionary 1052 (rev 4th ed 1968). An assignation is "an appointment of time and place for a meeting especially for illicit sexual relations." Webster's Third New International Dictionary, 132 (1976). We find that these terms are not unconstitutionally vague.[8] Accord, State ex rel. Webster v. Daugherty, supra; Hensley v. City of Norfolk, 216 Va 369, 218

SE2d 735 (1975).

VI

Finally, defendants claim that there was insufficient evidence to prove that defendant Tidyman was owner of the property and that, even if he were the owner, there was insufficient evidence to show that he knew of the lewdness, assignation and prostitution on the premises.

We agree with the trial court that defendants had not, by the unrecorded assignment to defendant Swan Management for a sum of $10, given up ownership of the subject property.

As to defendants' second contention, nowhere in the statutory scheme is actual knowledge on the part of the owner required in order to prove existence of and to abate the nuisance. ORS 465.110 provides that a place used for prostitution is a nuisance per se. "Common fame" of the premises as a house of prostitution is all that is required to establish the existence of the nuisance. ORS 465.140. ORS 465.120 provides for permanently enjoining the owner from maintaining the nuisance and ORS 465.150 provides for closing the building for one year for any purpose. Neither statute requires the owner to have knowledge of the prohibited activity in order for the court to order abatement. Instead, as discussed above, the owner may raise his lack of knowledge as an affirmative defense in order to avoid those parts of the abatement order which would

be personal to h'm. Defendants did not do so. ORS 465.155.

We conclude that the trial court acted correctly in issuing the abatement order.

Affirmed.

FOOTNOTES

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1

While the trial court's findings of fact state that the premises were used for lewdness, assignation and prostitution, the abatement order names only prostitution in its statement of the use to be enjoined.

2

ORS 465.150 provides:

"(1) If the existence of the nuisance is established in a suit under ORS 465.120, an order of abatement shall be entered as a part of the judgment in the case. This order shall direct:

"(a) Removal from the building or place of all fixtures, furniture, instruments, appliances, medicines, drugs, contents or movable property used in conducting the nuisance.

"(b) Sale of the property removed in the manner provided for the sale of chattels under execution.

"(c) The effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released.

"(2) No person shall break and enter or use a building, erection or place so directed to be closed.

"(3) For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property for execution. For closing the premises and keeping them closed a reasonable sum shall be allowed by the courts."

3

ORS 167.012 provides:

"(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, he knowingly:

"(a) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or

"(b) Induces or causes a person to engage in prostitution or to remain in a place of prostitution; or

"(c) Receives or agrees to receive money or other property, other than as a prostitute being compensated for personally rendered prostitution services, pursuant to an agreement or understanding that the money or other property is derived from a prostitution activity; or

"(d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.

"(2) Promoting prostitution is a Class C felony. (Emphasis supplied.)

4

Defendants point to the fact that violation of any injunction granted under the abatement statutes is a contempt of court and subjects the violator to a fine of up to $1000 or imprisonment of up to six months (ORS 465.160 and 465.990) as indictative of the punitive intent of the abatement scheme. However, these possible punishments are for contempt of court and not for maintaining the nuisance. They, therefore, are not factors to be considered in weighing the possible punitive intent of the abatement procedure.

5

ORS 465.180 provides:

"If the owner or lessee of the premises appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in such sum as the court may deem necessary, not to exceed the full value of the property to be ascertained by the court, or in vacation, by the clerk of the court, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order that the premises which have been closed under the order of abatement be delivered to the owner or lessee and that said order of abatement be canceled so far as it may relate to said property. If the bond is given and costs therein are paid before judgment and order of abatement, the suit shall be thereby abated as to said building and owner only."

6

ORS 465.130 provides in relevant part:

"(1) No preliminary injunction or restraining order shall issue without notice, but when such order is prayed for in the complaint and it appears from the facts shown by affidavits or by the complaint that a nuisance exists and tha the public interest and good morals require its prompt abatement, the court or judge thereof shall make an order fixing the time for the hearing of such application not less than three nor more than five days after service of notice on the defendant. Upon such hearing the court shall inquire into and dispose of the matter and for that purpose may receive evidence in the form of affidavits, oral or documentary testimony.

"(2) If it appears to the satisfaction of the court that such nuisance exists and that public morals and good order require that it be promptly abated, the court shall issue the preliminary injunction as prayed for."

In this case no preliminary injunction was issued. The trial

judge, upon agreement of the attorneys, heard all of the evidence in the case and then issued a final judgment and abatement order, rather than holding a separate hearing on a preliminary injunction.

7

We note that this issue is not, in any event, of constitutional proportion since the United States Supreme Court has held that "outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." Lavine v. Malne, 424 US 577, 47 L Ed 2d 249, 256, 96 S Ct 1010 (1976).

8

We have previously held that the term "lewd" is not unconstitutionally vague as used in ORS 472.180(5). Palm Gardens, Inc. v. OLCC, 15 Or App 20, 31, 514 P2d 888 (1973). That statute reads in relevant part:

> "'The commission may cancel or suspend any license granted if it finds:
>
> "'(5) That the licensee maintains a noisy, lewd, disorderly or insanitary establishment or has been supplying impure or otherwise deleterious beverages or food.'"

9

Defendants also challenge certain language in ORS 465.130

(see n 5) as unconstitutionally vague, as well as claiming that that statute violates due process requirements because it does not require a finding of "irreparable injury" before allowing a preliminary injunction to issue. We decline to reach these challenges because no preliminary injunction was issued in this case (see n 5).